LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. [redacted]

WILLIAM H. BENSON, JR.,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

HARRY G. FINS
77 W. Washington Street
Suite 1521
Chicago 2, Illinois
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6581

INDEX

	PAGE
Opinion of the Court Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting Writ	4
Appendix I—Opinion of the Supreme Court of Illinois	11
Appendix II—Judgment Order of the Supreme Court of Illinois	16

CITATION OF AUTHORITIES

Cases

Adamson v. California, 332 U.S. 46, 71-72	6
Bartkus v. Illinois, 359 U.S. 121, 151-155	4
Brock v. North Carolina, 344 U.S. 424, 429	6
Chambers v. Florida, 309 U.S. 227, 236	5
Cohen v. Hurley, 366 U.S. 117, 154	6
Foo v. United States, 369 U.S. 141, 143	7
Hans Nielsen, Petitioner, 131 U.S. 176, 189	8
Palko v. Connecticut, 302 U.S. 319, 325	5

Constitutional Provisions

U. S. Constitution, Amendment V	5, 6, 7
U. S. Constitution, Amendment XIV	5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No.

WILLIAM H. BENSON, JR.,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William H. Benson, Jr., respectfully prays that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois entered on January 23, 1962. A timely petition for rehearing was filed. The Supreme Court of Illinois modified its opinion and denied the petition for rehearing on March 22, 1962.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois is reported at 24 Ill. 2d 159, 180 N.E. 2d 483 (Appendix 1, *infra*).

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Whether the doctrine of "double jeopardy" as guaranteed in Federal prosecutions by the Fifth Amendment is also guaranteed in State prosecutions by the "due process of law" clause of the Fourteenth Amendment to the Constituion of the United States.

2. Whether an accused who was convicted in a State trial court and whose conviction was reversed without remandment by the highest court of the State and the accused discharged, may, after his discharge, be reindicted and retried for the same crime without violating the "due process of law" clause as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether an accused, who was charged with murder through rape, was tried and convicted of murder and the conviction was reversed without remandment by the highest court of the State and the accused discharged, may, after the discharge, be charged and convicted of rape without violating the "due process of law" clause as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

The Fourteenth Amendment to the Constiution of the United States provides "nor shall any state deprive any person of life, liberty or property, without due process of law".

STATEMENT OF THE CASE.

On January 11, 1958, the defendant William H. Benson, Jr., had sexual relations with Hester Burton. Hester Burton died on the same day. On April 3, 1958, the defendant was indicted for murder in an indictment consisting of two counts: Count I charged him with murder through forcible rape and Count II charged him with murder through assault. The defendant pleaded not guilty. He was tried by a jury in the Criminal Court of Cook County, was found guilty of murder and was sentenced to the penitentiary for a term of 25 years. On writ of error, the Supreme Court of Illinois reversed without remanding, *People* v. *Benson*, 19 Ill. 2d 50, 61, 166 N.E. 2d 80, 86, and the defendant was discharged (Abstract of Record as prepared for use in the Supreme Court of Illinois, p. 6, hereafter referred to as Abstract of Record).

On June 15, 1960, the defendant William H. Benson, Jr., was indicted for the forcible rape of Hester Burton on January 11, 1958 (Abstract of Record, p. 2). The defendant moved for a discharge on the ground of double jeopardy as guaranteed by the Fourteenth Amendment to the Constitution of the United States (Abstract of Record, pp. 4-7). The trial court denied the motion (Abstract of Record, p. 32). The defendant pleaded not guilty (Abstract of Record, p. 2). He was tried by a jury, found guilty of forcible rape, and, on October 6, 1960, was sentenced to the penitentiary for a term of 2 years (Abstract of Record, p. 34).

William H. Benson, Jr. sued out a writ of error from the Supreme Court of Illinois, and, on January 23, 1962, the Supreme Court of Illinois affirmed the judgment of the Criminal Court of Cook County (Appendix II, *infra*). Within the time allowed by law, the defendant filed a petition for rehearing. The Supreme Court of Illinois modified its opinion and denied the petition for rehearing on March 22, 1962.

In the trial court in the case at bar, the defendant raised the federal constitutional question in his motion before trial (Abstract of Record, pp. 6-7), and again raised the federal constitutional question in his motion after trial (Abstract of Record, pp. 7-8). The defendant raised the federal constitutional question in the Supreme Court of Illinois (Brief and Argument for Plaintiff in Error in Supreme Court of Illinois, pp. 8, 9, 12, 22-25, 26; and Reply Brief for Plaintiff in Error in Supreme Court of Illinois, p. 7, both Briefs included in the certified record filed in this Court). The defendant again raised the federal constitutional question in his Petition for Rehearing in the Supreme Court of Illinois (Petition for Rehearing in Supreme Court of Illinois, pp. 2-3, 5, included in the certified record filed in this Court).

REASONS FOR GRANTING WRIT

The following are the three reasons for the granting of the Writ of Certiorari, in the order in which the questions are presented on page 3, *supra*:

I. In the recent case of *Bartkus* v. *Illinois*, 359 U.S. 121, Mr. Justice Black, writing for himself, Chief Justice Warren and Mr. Justice Douglas, in explaining the importance of the "double jeopardy" doctrine, said at pages 151-155:

> "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a 'universal maxim of the common law.' It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as

fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations. It has, in fact, been described as a part of all advanced systems of law and as one of those universal principles 'of reason, justice and conscience, of which Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same." ' While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same Offence more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people.' "'

Although the first eight amendments to the Federal Constitution have not been held by a majority of the Justices of the Supreme Court of the United States to be *ipso facto* incorporated into the Fourteenth Amendment to the Federal Constitution, it is well settled that a State procedure is prohibited by the Fourteenth Amendment if it violates a "principle of justice so rooted in the traditions and conscience of our people" as to be deemed indispensable to "a fair and enlightened system of justice." *Palko* v. *Connecticut*, 302 U.S. 319, at page 325.

The Fifth Amendment to the Constitution of the United States provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

In *Chambers* v. *Florida*, 309 U.S. 227, Mr. Justice Black, writing the majority opinion, maintained (at page 236) that the Fifth Amendment to the Federal Constitution was incorporated into the Fourteenth Amendment and is applicable to the States.

In *Adamsson* v. *California*, 332 U.S. 46, Mr. Justice Black, joined by Mr. Justice Douglas, maintained (at pages 71-72) that the Fourteenth Amendment to the Constitution of the United States carried over intact the first eight Amendments (Bill of Rights) as limitations on the States.

In *Cohen* v. *Hurley*, 366 U.S. 117 (1961), Mr. Justice Brennan, writing for himself and Chief Justice Warren, maintained (at page 154) that the Fifth Amendment to the Constitution of the United States was "absorbed by the Fourteenth Amendment and therefore is secured against impairment by the States."

Mr. Justice Frankfurter, in a concurring opinion in *Brock* v. *North Carolina*, 344 U.S. 424, said at page 429: "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted . . ."

We respectfully submit that after a person has been charged with murder through rape and evidence of rape has been introduced against him and he was discharged, a State, in indicting and trying him a second time for rape, violates a "principle of justice so rooted in the traditions and conscience of our people" as to be deemed indispensable to "a fair and enlightened system of justice" and the "State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted."

It appears that the majority of the members of the United States Supreme Court, namely, Chief Justice Warren, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Brennan, are of the opinion that the question of "double jeopardy" involved in a state prosecution is protected by the Fourteenth Amendment to the Constitution of the United States.

2. This Honorable Court's special attention is called to the fact that after the reversal of the murder conviction by the Supreme Court of Illinois, without remandment, the *defendant was discharged* (Abstract of Record, p. 6).

The opinion of the Supreme Court of Illinois in the case at bar establishes a *new doctrine*, namely, that a reversal of a conviction by a reviewing court *followed by a discharge of the defendant* does not create "jeopardy".

We maintain that while the reversal alone did not create "jeopardy", the reversal followed by the *discharge of the defendant* (Abstract of Record, p. 6) did create "jeopardy", and the subsequent prosecution of the defendant constituted "double jeopardy" in violation of his constitutional guarantee under the Fourteenth Amendment to the Constitution of the United States.

The decision of the Supreme Court of Illinois in the case at bar is directly contrary to the holding of the Supreme Court of the United States in *Foo* v. *United States*, 82 S.Ct. 671, decided March 19, 1962. In the *Foo* case, the trial court discharged the defendants in the middle of the government's case, after "three government witnesses had appeared and a fourth was in the process of testifying." The Supreme Court of the United States referred to the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb" and concluded its *Per Curiam* opinion (at page 143) as follows:

> "That constitutional provision is at the very root of the present case, and we cannot but conclude that the guaranty was violated when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense.
>
> The petitioners were tried under a valid indictment in a federal court which had jurisdiction over their

persons and over the subject matter. The trial did not terminate prior to the entry of judgment, as in *Gori* v. *United States*, 367 U.S. 364. It terminated with the entry of a final judgment of acquittal as to each petitioner. The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' *United States* v. *Ball*, 163 U.S. 662, 671.

Reversed."

3. In *Hans Nielsen, Petitioner*, 131 U.S. 176, the Supreme Court of the United States said at page 189:

"It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one. In Mr. Wharton's Treatise on Criminal Law, vol. 1, § 560, the rule is stated as follows, to-wit: 'An acquittal or conviction for a greater offence is a bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less;' and he instances several cases in which the rule applies; for example, 'An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of larceny.' If one be indicted for murder, and acquitted, he cannot be again indicted for manslaughter.' 'If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of a burglary with violence, under 7 Wm. IV and 1 Vic. c. 86.2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence.' 'An acquittal for seduction is a bar to an indictment for fornication with the same prosecutrix.'"

It is well settled that if one inflicts an assault and battery upon another and thereby kills him and if the assailant is indicted and tried for murder and is acquitted, he may not thereafter be tried for the assault and battery which caused the death of the victim. The lesser crime of assault and battery is included in the greater crime of murder, and the subsequent prosecution for assault and battery is barred by the constitutional prohibition against "double jeopardy".

Assault and battery embraces two elements, namely, force applied by the assailant and injury received by the person assailed. Forcible rape is a form of assault and battery, and, likewise, embraces the same two elements, namely, force applied by the assailant and injury received by the person assailed. Thus, if the defendant, William Benson, Jr., had struck his victim (the deceased) with his clenched fist and thereby killed her, and if he had been indicted for murder through such assault and battery and was tried and acquitted, he could not thereafter be tried for assault and battery. In the case at bar, the defendant inflicted the injury upon his victim by the use of a male sex organ, which is a part of his body just as is a clenched fist. In the indictment for murder, the defendant William Benson, Jr., was expressly charged with killing the deceased through "*the forcible rape of Hester Burton*" (Abstract of Record pp. 8-9), and the defendant was found not guilty by the Supreme Court of Illinois and thereafter *the defendant was discharged* (Abstract of Record p. 6). Therefore, the State of Illinois was, subsequent to the discharge, barred from prosecuting the defendant for forcible rape, just as it would have been barred from prosecuting the defendant for assault and battery if the murder had resulted from the use of defendant's clenched fist.

CONCLUSION.

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

HARRY G. FINS
Chicago, Illinois
Attorney for petitioner

APPENDIX I

Opinion of the Supreme Court of Illinois

The People of the State of Illinois, Defendant in Error, v. William H. Benson, Jr., Plaintiff in Error.

Mr. Justice Solfisburg delivered the opinion of the court:

On June 16, 1960, the defendant, William H. Benson, Jr., was indicted for the forcible rape of Hester Burton. The defendant moved for a discharge on the ground of *res adjudicata* and former jeopardy. The trial court denied the motion, and the defendant pleaded not guilty. After trial by jury he was found guilty of forcible rape and sentenced to the penitentiary for a term of two years. He prosecutes this writ of error to reverse the judgment of the criminal court.

The sole ground upon which defendant seeks to reverse the judgment of the trial court is that the reversal of his prior murder conviction operated as an adjudication that the defendant was not guilty of rape and that his second trial constituted double jeopardy. In order to consider this defense, it is necessary to review the prior proceedings. The defendant admitted he had sexual intercourse on January 11, 1958, with Hester Burton, who died on the same day. On April 3, 1958, the defendant was indicted for murder on an indictment consisting of two counts. The first count stated that "William H. Benson, Junior, then and there unlawfully, feloniously, wilfully, violently, and of his malice aforethought made an assault in and upon the body of one Hester Burton, who then and there was a female person and who then and there was in the peace of the People of said State of Illinois; that said William H. Ben-

son, Junior, then and there unlawfully, feloniously, wilfully, violently and forcibly was engaged in the prosecution of a felonious intent, to-wit: the forcible rape of Hester Burton; and that in the prosecution of said felonious intent said William H. Benson, Junior, then and there unlawfully, feloniously, wilfully and of his malice aforethought killed and murdered said Hester Burton.

"That is to say that said William H. Benson, Junior then and there feloniously and violently made said assault upon said Hester Burton, and that said William H. Benson, Junior then and there feloniously and forcibly ravished and carnally knew said Hester Hurton against her will; and that in the commission of said rape upon said Hester Burton said William H. Benson, Junior thereby then and there caused said Hester Burton to suffer a mortal shock and a brain hemorrhage, of which mortal shock and said brain hemorrhage said Hester Burton thereafter died on the same eleventh day of January in the year of our Lord one thousand nine hundred and fifty-eight, in said County of Cook, in the State of Illinois aforesaid; and so the Grand Jurors aforesaid, upon their oaths aforesaid, do say that said William H. Benson, Junior unlawfully, feloniously, wilfully and of his malice aforethought killed and murdered said Hester Burton in manner and form aforesaid and by the means aforesaid; * * *."

Count II, in essence, charged that defendant murdered Hester Burton by making an assault on her body by some violent and unknown means, and that he inflicted divers wounds, cuts, bruises, fractures and hemorrhages on various parts of her body from whence she died.

After trial on said indictment the jury returned a verdict finding defendant guilty of murder in the manner and form charged in the indictment and he was sentenced to the peni-

tentiary for a term of 25 years. Upon writ of error from that judgment this court reversed in *People* v. *Benson*, 19 Ill. 2d 50. In that case we held that the proof showed beyond reasonable doubt that an illegal act of rape was committed by the defendant, which, under some conditions, might be a criminal agency that could cause death. However, we further held that proof was lacking beyond reasonable doubt that the death of Hester Burton in fact resulted from the illegal act of intercourse or from any other criminal agency for which defendant was responsible. We therefore reversed the judgment of the trial court.

It is the theory of defendant that when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the accused may be discharged of the higher and convicted of the lower offense embraced within the higher. He therefore contends that under the prior murder indictment the defendant could have been found guilty of rape and therefore the reversal of the murder conviction without remandment operated as an acquittal and a prior adjudication of the charge of rape. Thus he claims his subsequent trial on that charge constituted double jeopardy.

In our opinion the crux of this case is the legal effect of our prior decision in *People* v. *Benson*, 19 Ill. 2d 50. It is well settled that the retrial of an accused, after a judgment of conviction has been reversed and the cause remanded, does not justify a claim of double jeopardy. *People* v. *Keagle*, 7 Ill. 2d 408; *People* v. *Woodward*, 394 Ill. 433; *Stroud* v. *United States*, 251 U.S. 15, 64 L. ed. 103.

It has been well stated that a defendant cannot by his own act avoid the jeopardy in which he stands and then assert it as a bar to subsequent jeopardy. (*Murphy* v. *Massachusetts*, 177 U.S. 155, 44 L.ed. 711.) We think the fact that the former conviction has been set aside at defendant's instance is the basis of the rule, and it is not decisive that the appellate tribunal has or has not remanded after a reversal. In *Lane* v. *People*, 5 Gilm. 305, this court reversed the judgment of conviction and ordered the prisoner discharged. However, the court stated: "As the judgment will be reversed at the instance of the prisoner, he will not, in legal contemplation, have been in jeopardy, and may again be indicted and put on his trial for the same offence." The *Lane* case was cited with approval in *People* v. *Scales*, 18 Ill. 2d 283.

In *Gannon* v. *People*, 127 Ill. 507, we held that where a judgment of conviction was vacated at the defendant's motion, it was not double jeopardy to retry the accused on a new indictment for the same offense.

Defendant's prior conviction has been set aside. It cannot be contended that the jury, by finding defendant guilty of the greater offense, acquitted him of the lesser. Nor is this court's prior opinion ambiguous on this point. We specifically pointed out that: "* * * it is our opinion the proof shows beyond reasonable doubt that an illegal act of rape was committed by defendant * * *". (*People* v. *Benson*, 19 Ill. 2d 50.) We know of no case, and none has been suggested to us to indicate that the reversal in the prior case amounted to an acquittal of the charge of rape.

We think it clear that defendant by appealing his former conviction subjected himself to whatever appropriate action might be taken by this court. (Cf. *Forman* v. *United States*, 361 U.S. 416, 4 L. ed. 2d 412.) In the prior appeal the action of this court was clear. Neither the judgment of the trial court nor our reversal amounted to a prior conviction or acquittal of the charge of rape. We, therefore, hold that the People were entitled to proceed appropriately by a new indictment on that charge. It was unnecessary for this court to have remanded the cause on the prior appeal for a new trial for rape on the original indictment.

From what we have said it is unnecessary for us to consider whether or not the charge of rape was a lesser offense included in the original indictment. There being no other grounds raised for reversal of the judgment of the trial court, that judgment is accordingly affirmed.

Judgment affirmed.

APPENDIX II

Judgment Order of the Supreme Court of Illinois

Be it remembered, that, to-wit: on the 23rd day of January, 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People of the State of Illinois,
Defendant in Error
No. 36666 vs.
William Benson, Junior,
Plaintiff in Error
} Error to Criminal Court Cook County 60—1937

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in the record there is no error.

Therefore, it is considered by the Court that the judgment of the Criminal Court of Cook County, aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.